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In the Supreme Court of the United States

OCTOBER TERM, 1988

BLINDER, ROBINSON & CO., INC.
AND MEYER BLINDER, PETITIONERS

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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16 pp

QUESTION PRESENTED

Whether the Due Process Clause prohibits the Securities and Exchange Commission from bringing an injunctive action against a registered securities broker-dealer and, following the court's determination that the broker-dealer violated the securities laws, imposing administrative remedial sanctions.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-33a) is reported at 837 F.2d 1099.

JURISDICTION

The judgment of the court of appeals was entered on January 15, 1988. A petition for rehearing was denied on March 17, 1988. The petition for a writ of certiorari was filed on June 3, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners Blinder, Robinson & Co., Inc., a registered securities broker-dealer, and Meyer Blinder, its president and principal shareholder, seek review of a court of appeals decision arising from a Securities and Exchange

Commission proceeding to determine whether petitioners should be subject to remedial sanctions in light of their violation of the federal securities laws. The Commission initiated the proceeding, pursuant to Sections 15(b) and 19(h) of the Securities Exchange Act of 1934 (Exchange Act), 15 U.S.C. 78*o*(b) and 78s(h), after first pursuing a civil injunctive action against petitioners,[1] in which a federal district court found that petitioners knowingly and intentionally had committed serious violations of anti-fraud and antimanipulation provisions of the securities laws while acting as an underwriter in a securities offering. See *SEC* v. *Blinder, Robinson & Co.*, 542 F. Supp. 468 (D. Colo. 1982), aff'd, [1983-1984 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 99,491 (10th Cir. 1983), cert. denied, 469 U.S. 1108 (1985).[2]

In the administrative proceeding, the Commission determined that remedial sanctions were appropriate under the circumstances, which included (i) the serious nature of petitioners' fraud, (ii) their prior disciplinary history, and (iii) the fact that Meyer Blinder still controls the firm. The Commission concluded that the firm's registration as a securities broker and dealer should be suspended for 45 days (but that it could effect unsolicited trades, complete transactions, and make deliveries); that it should be prohibited from underwriting any securities offering for two years; and that Blinder should be barred

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[1] The Commission brought the civil enforcement action pursuant to Section 20(b) of the Securities Act of 1933 (Securities Act), 15 U.S.C. 77t(b), and Section 21(d) of the Exchange Act, 15 U.S.C. 78u(d).

[2] The district court found that petitioners violated Section 17(a) of the Securities Act, 15 U.S.C. 77q(a); Section 10(b) of the Exchange Act, 15 U.S.C. 78j(b), and Rules 10b-5, 10b-6, and 10b-9 promulgated thereunder, 17 C.F.R. 240.10b-5, 10b-6, and 10b-9; and Section 15(c) of the Exchange Act, 15 U.S.C. 78*o*(c), and Rule 15c2-4 promulgated thereunder, 17 C.F.R. 240.15c2-4.

from association with any broker or dealer, with the proviso that after two years he could apply for association. Pet. App. 35a-58a.

On review, the court of appeals vacated the Commission's order and remanded the case for further proceedings based on the court's determination of an evidentiary question (Pet. App. 1a-24a). In the course of that decision, the court carefully considered and rejected petitioners' claim that the Due Process Clause prohibited the Commission from bringing the administrative proceeding (*id.* at 10a-17a). It concluded that the Commission's initiation and prosecution of an injunctive action against petitioners in a federal district court did not disqualify the Commission from deciding the separate issue whether administrative remedial action should be taken in order to protect the public interest. The court noted (*id.* at 11a) that the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, specifically contemplates that agency members may exercise such combined functions (see 5 U.S.C. 554(d)) and that the constitutionality of the "APA sanctioned regime" was "strongly suggested (if indeed not settled)" by this Court's decision in *Withrow* v. *Larkin*, 421 U.S. 35 (1975), approving an agency's exercise of combined functions.

The court of appeals further observed (Pet. App. 14a) that the Commission's decision here to litigate first in federal court, rather than to institute administrative proceedings, actually enhanced petitioners' due process safeguards. Petitioners were "afforded the not insubstantial advantage of the neutral forum provided by an Article III court with its attendant procedures and protections" (*ibid.*). The court additionally recognized that Congress gave the Commission express statutory authority under 15 U.S.C. 78*o*(b) to bring administrative proceedings based

on the entry of injunctions (Pet. App. 16a) and that acceptance of petitioners' due process argument "would do considerable violence to Congress' purposes in establishing a specialized agency to regulate in the difficult and challenging world of financial markets and securities regulation" (*id.* at 17a).

ARGUMENT

The court of appeals' due process ruling is correct, it does not conflict with any decision of this Court or any other court of appeals, and accordingly it does not warrant further review. This Court normally does not grant certiorari to review cases that have been remanded for further proceedings, and petitioners' due process contention does not justify a departure from that practice.

1. The Exchange Act gives the Commission authority to enforce the securities laws and to regulate the activities of securities industry professionals. Under that Act, the Commission is authorized both to seek injunctions against any person who violates the federal securities laws (15 U.S.C. 78u(d)) and to determine, on the basis of an administrative record, whether it is in the public interest to impose administrative remedies on securities industry firms and personnel who have been enjoined (15 U.S.C. 78*o*(b)(4)(C) and (6)). This latter function includes the responsibility for determining whether the public interest is best served by excluding particular persons from the industry. The Exchange Act does not require the Commission to elect between the two types of proceedings. Quite to the contrary, Congress apparently recognized that the Commission's administrative authority would be severely undermined if, upon obtaining an injunction based upon a judicial determination that a registered broker-dealer had violated the securities laws, the Commission could not

impose administrative sanctions restricting the professional activities of the entity.

Petitioners' due process challenge to this statutory scheme is without merit. This Court has recognized that federal statutes providing for administrative adjudication are entitled to a "strong presumption" of constitutionality in light of the " 'congressional solicitude for fair procedure * * *.' " *Schweiker* v. *McClure*, 456 U.S. 188, 200 (1982) (quoting *Califano* v. *Yamasaki*, 442 U.S. 682, 693 (1979)). Petitioners fall far short of overcoming that presumption here. This Court has held that an agency may combine adversarial and adjudicative functions and that an agency is not disabled from deciding an administrative case simply because it has authorized the underlying investigation and subsequently approved the filing of the charges. See *Withrow* v. *Larkin*, 421 U.S. 35, 52 (1975).[3] Indeed, it is "very typical for the members of administrative agencies to receive the results of investigations, to approve the filing of charges or formal complaints instituting enforcement proceedings, and then to participate in the ensuing hearings. This mode of procedure does not violate the Administrative Procedure Act, and it does not violate due process of law" (*Withrow*, 421 U.S. at 56 (footnote omitted)). See also, *e.g.*, *FTC* v. *Cinderella Career & Finishing Schools, Inc.*, 404 F.2d 1308, 1315 (D.C. Cir. 1968).

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[3] See generally, 3 K. Davis, *Administrative Law Treatise* § 18.2 (2d ed. 1980); Asimow, *When the Curtain Falls: Separation of Functions in the Federal Administrative Agencies*, 81 Colum. L. Rev. 759, 787 (1981) ("[c]learly combinations arising because a legislature gives investigating, negotiating, prosecuting, and adjudicating tasks to a single agency, so that agency heads are ultimately responsible for all functions, do not violate due process").

In *Withrow*, the Wisconsin State Examining Board investigated a physician's compliance with the state rules of professional conduct and determined that a violation had probably occurred; it then held an administrative proceeding to decide whether its initial conclusion was correct. See 421 U.S. at 38-43. Petitioners suggest that the present case is distinguishable because the Commission, upon investigation, first brought an enforcement action before a federal district court and then held an administrative proceeding. See Pet. 7. But as the court of appeals explained (Pet. App. 14a), there is no "meaningful distinction in the suggested difference." The sequence of events here presents no greater risk of bias or prejudgment than in *Withrow*. There is no reason to think that the Commission "would be so psychologically wedded" (421 U.S. at 57) to its decision to file a district court complaint that it could not conduct fairly a subsequent administrative adjudication. Quite to the contrary, there is a "presumption of honesty and integrity in those serving as adjudicators" (*Withrow*, 421 U.S. at 47).[4] Petitioners' suggestion of bias is particularly farfetched here, where none of the Commissioners who approved the filing of the 1980 injunctive action (and only one of the Commissioners who considered a post-appeal settlement offer) participated in the decision to impose administrative sanctions. See Pet. App. 15a.[5]

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[4] Accord *FCC* v. *Schreiber*, 381 U.S. 279, 296 (1965); *United States* v. *Morgan*, 313 U.S. 409, 421 (1941); Pet. App. 14a n.7. See also *Jonal Corp.* v. *District of Columbia*, 533 F.2d 1192, 1197 (D.C. Cir.) (noting the "presumption in favor of impartiality in administrative hearings irrespective of some overlap of adjudicative, prosecutorial and investigative function * * *"), cert. denied, 429 U.S. 825 (1976).

[5] Petitioners provide no basis for concluding that the Commissioners who heard this case were actually biased. The Commissioners

Petitioners' due process objections are also especially infirm here, where the two proceedings have "different bases and purposes" (*Withrow*, 421 U.S. at 58). The first of the two proceedings—a suit for injunctive relief before a detached judicial tribunal—was brought to enjoin ongoing violations of the securities laws. The Commission's authorization of that suit indicated a belief, confirmed by the court's ultimate judgment, that petitioners had violated the securities laws. But petitioners' securities law violations were not at issue in the Commission's administrative proceeding—they had already been conclusively established in the district court. The administrative proceeding addressed the distinct question whether administrative remedies were necessary to protect the public. The Commission's oversight responsibilities for the injunctive suit provide no basis for assuming bias or prejudgment on that separate question. The Commissioners' involvement in an injunctive action, after they have authorized its institution, is necessarily limited by their delegation of responsibility to their staff, by the sheer volume of such litigation, and by the Commission's need to devote its resources to "broad ranging areas of responsibility over the wide world of securities markets" (Pet. App. 15a n.8). Cf. Davis, *Separation of Functions in Administrative Agencies*, 61 Harv. L. Rev. 389, 407 (1948) ("[agency] supervision of investigators and prosecutors does not mean that [agency] members are in any real sense engaging in investigating or prosecuting"). The Commis-

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have sworn to execute faithfully the laws they are charged with administering (see 5 U.S.C. 3331) and must be presumed capable of determining sanctions fairly. In any event, the case has been remanded for further proceedings and there is no basis to anticipate bias on remand; indeed, it is inappropriate for courts to "assume in advance that an administrative hearing may not be fairly conducted." *Fahey* v. *Mallonee*, 332 U.S. 245, 256 (1947).

sion's limited supervisory contacts in injunctive actions provide far less possibility than in *Withrow* that agency members would develop a bias owing to their prior exposure to the case. See Pet. App. 14a.[6]

Petitioners' unduly constrained reading of *Withrow* is inconsistent with the general thrust of that decision, which recognizes the presumptive constitutionality of statutes providing for the combination of administrative functions. The Court acknowledged the widespread practice of giving agencies combined functions, noting that disallowing that practice would " 'bring down too many procedures designed, and working well, for a governmental structure of great and growing complexity' " (*Withrow*, 421 U.S. at 49-50 (citation omitted)).[7] That concern is plainly impli-

[6] Petitioners largely ignore *Withrow* and rely almost entirely (Pet. 8-10) on an affidavit (Pet. App. 59a-66a), which was prepared after the court of appeals' decision (Pet. 8 n.1), that purports to demonstrate that members of the Commission take a more active role supervising injunctive actions than administrative enforcement actions. Assuming arguendo the accuracy of that description, it misses the point. The question is not whether the Commission employs different procedures in exercising its different functions; it is whether the Commission's procedures here distinguish the case from *Withrow*. Petitioners acknowledge that the only distinction is that the Commission here is a "civil litigant" (Pet. 8), rather than an investigator in its own proceedings. As we show above, that is not a meaningful distinction. Petitioners also seem to attach significance (Pet. 3, 10) to the fact that the Commission acceded to their request that it consider an offer of "settlement" in conjunction with its determination whether to bring the present administrative proceeding. But as *Withrow* indicates (421 U.S. at 56 n.24), an agency's consideration of a settlement proposal does not raise due process concerns in this context.

[7] The most obvious example is the Administrative Procedure Act, which, as the court of appeals noted (Pet. App. 11a), prohibits agency staff from combining prosecutorial and adjudicative duties but expressly exempts agency members from this prohibition of combined functions (5 U.S.C. 554(d)). Congress created this exemption in

cated here, where the statutory scheme has been in place for 50 years. Congress found it necessary to give the Commission both judicial and administrative recourse in order to protect investors against persons who have violated the securities laws and are likely to do so again. There are many situations in which the Commission needs the flexibility to proceed first injunctively and then administratively.[8] Congress's judgment that the statutory scheme employed here affords sufficient due process is entitled to respect. Indeed, to rule otherwise would threaten numerous other longstanding congressionally sanctioned

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recognition of the "nature of administrative agencies, where the same authority is responsible for both the investigation-prosecution and the hearing and decision of cases." S. Rep. 752, 79th Cong., 1st Sess. 18 (1945). This Court saw no due process defects in the APA approach. See *Withrow*, 421 U.S. at 52.

[8] For example, the public interest may require the agency to seek an immediate injunction against serious on-going violations and later bring a proceeding to remove the perpetrators from a profession which provides innumerable opportunities to victimize investors. In such circumstances, Congress has determined that neither a contempt judgment nor a second injunction would offer the same protection to the public as an expulsion of the malefactors from the industry. If the Commission is disabled from proceeding administratively against such persons, the victims are the public investors. See *Pangburn* v. *CAB*, 311 F.2d 349 (1st Cir. 1962) (rejecting a due process challenge to an agency's combination of functions on the ground that it would disable the agency from protecting the public). Cf. *FTC* v. *Cement Inst.*, 333 U.S. 683, 701-702 (1948). In addition, the Commission sometimes finds it necessary (as here) to bring a single injunctive action against both persons who are subject to this type of Commission administrative proceeding and persons who are not. Petitioners' approach would require the Commission to proceed piece-meal against persons who have engaged in the same fraudulent activities or to delay injunctive and ancillary equitable relief, such as paying to victims of securities fraud the disgorged proceeds from wrongdoers.

administrative programs.[9]

2. Petitioners assert (Pet. 6) that this case presents an issue that was left open by *Gibson* v. *Berryhill*, 411 U.S. 564 (1973), and has not been resolved by this Court's subsequent decisions. They alternatively assert (Pet. 6) that the case conflicts with other decisions of this Court. Both assertions are inaccurate. As we have explained, the Court's decision in *Withrow* v. *Larkin, supra,* which was decided after *Gibson,* controls here and resolves any question left open in that case.[10] And the supposedly conflicting cases are all readily distinguishable. Petitioners rely primarily on cases (Pet. 11-13), decided prior to *Withrow,* in which a single person improperly exercised a combination of functions; those cases are simply not applicable to collective decision-making by expert agencies.[11] The cases

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[9] The Commodity Futures Trading Commission, Federal Trade Commission, and National Labor Relations Board, for example, all act under statutes providing for similar combinations of functions. See 7 U.S.C. (& Supp. IV) 9, 13a-1, 13b; 15 U.S.C. (& Supp. IV) 45, 53; 29 U.S.C. 160(b), (c) and (j).

[10] In *Gibson,* this Court found a due process violation where the Alabama State Board of Optometry, composed of practicing optometrists, sought to hear charges against business competitors potentially resulting in the loss of their optometry licenses. This Court noted that the Board had also filed a judicial complaint against the competitors to seek revocation of their licenses, but the Court specifically declined to determine whether that action led to possible bias sufficient to disqualify members of the Board. See 411 U.S. at 578-579. Notably, the situation in *Gibson* is distinguishable from the present case in light of the Board members' pecuniary interest in the outcome and the fact that the Board sought the *same* remedy in both the state court and the administrative proceeding.

[11] The Court made clear in *Withrow* that its previous decisions in cases such as *In re Murchison,* 349 U.S. 133 (1955), should not be "understood to stand for the broad rule that the members of an administrative agency may not investigate the facts, institute proceedings, and then make the necessary adjudications" (421 U.S. at 53). *Murchison* itself was limited to an unusual situation where a state

that petitioners cite that do involve collective decision-makers involve the wholly distinct question of disqualification based on a pecuniary interest in the outcome.[12]

3. The court of appeals vacated the Commission's order for failure to consider certain evidence and remanded the case for further proceedings before the Commission (Pet. App. 30a). Nothing in petitioners' argument justifies the unusual step in such a situation of granting certiorari and thereby interrupting a statutorily authorized administrative proceeding. See, *e.g.*, *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostock R.R.*, 389 U.S. 327 (1967). See generally R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* § 4.18 (6th ed. 1986).

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judge had acted as a one-man grand jury and then passed on the guilt or innocence of those he had charged with contempt in the secret proceeding. Such a judge, the Court reasoned, would be biased by relying in all likelihood on his own impressions of what had occurred in his presence in the grand jury room, which " 'could not be tested by adequate cross-examination' " (*Withrow*, 421 U.S. at 53 (quoting *Murchison*, 349 U.S. at 138)). See also *Offutt* v. *United States*, 348 U.S. 11, 17-18 (1954) (trial judge who became "personally embroiled" in disputes with counsel must recuse himself from hearing criminal contempt charges against counsel); *Morrissey* v. *Brewer*, 408 U.S. 471, 486 (1972) (parole revocation decision should be made by someone other than officer who reported parole violations); *Young* v. *United States ex rel. Vuitton et Fils*, No. 85-1329 (May 26, 1987) (when one party allegedly violates an injunction, the attorney for the other private party may not be appointed to prosecute contempt action).

[12] See *Gibson* v. *Berryhill*, *supra*, discussed at note 10, *supra*. Likewise, *Dr. Bonham's Case*, 8 Eng. Rep. 114a (C.P. 1610) and *City of London* v. *Wood*, 12 Mod. Rep. 669 (1701), cited by petitioners (Pet. 13), both concern administrative bodies that had a pecuniary interest in imposing sanctions. As the court of appeals noted, "[w]hile edifying, *Dr. Bonham's* case and its progeny have no bearing on the issue before us" (Pet. App. 16a n.9).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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